Kasser Distiller Products Corp. *and* Teamsters Union Local No. 115, a/w International Brotherhood of Teamsters, AFL–CIO.[1] Case 4–CA–18498

June 15, 1992

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND RAUDABAUGH

On November 15, 1990, Administrative Law Judge Elbert D. Gadsden issued the attached decision. The Respondent filed exceptions and a supporting brief and the General Counsel filed an exception and an answering brief in response to the Respondent's exceptions. On June 25, 1991, the Board remanded the proceeding for further findings.[2] On October 31, 1991, the judge issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief and the General Counsel filed an answering brief in response to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decisions and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[3] and conclusions and to adopt the recommended Order as modified.[4]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Kasser Distiller Products Corp., Philadelphia, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 2(b) and reletter the subsequent paragraphs.

''(b) Give effect to the terms and provisions of that memorandum of agreement retroactive to November 2, 1989.''

2. Substitute the attached notice for that of the administrative law judge.

MEMBER RAUDABAUGH, concurring.

The issue in this case is whether Respondent informed the Union that Respondent Negotiator Knox lacked authority to enter into an agreement. The evidence establishes that Respondent's negotiators, in conversation with each other as they sat across from the Union's negotiators, spoke of the limitations on Knox's authority to enter into an agreement. However, the judge appears to find that the union representatives did not hear this conversation. Because of the physical proximity of the Respondent and union negotiators, and the unchallenged testimony that the conversation was not conducted in a low voice, I find it hard to believe that the union negotiators did not hear this conversation. Indeed, they do not even claim that they did not hear it. However, I do not find it necessary to resolve this issue. For, even if the union negotiators did hear the conversation, the more significant finding is that the remarks were not directed to them. The judge found that the Respondent's negotiators did not *directly communicate to the Union* the lack of authority of Knox. I believe that a matter as important as placing limitations on bargaining authority should be directly and clearly conveyed to the other party. See *University of Bridgeport*, 229 NLRB 1074 (1977). Because this was not done, I agree with my colleagues that Knox's subsequent agreement with the Union was binding on Respondent.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we have violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail and refuse to sign and execute the memorandum of agreement entered into with the Union on November 2 and 3, 1989, and transmitted to us by the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed them by Section 7 of the Act.

WE WILL, on request, sign and execute the above-described agreement we entered into with the Union on November 2 and 3, 1989.

[1] The name of the Charging Party has been changed to reflect the new official name of the International Union.

[2] Not included in bound volumes. Member Raudabaugh dissented.

[3] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Member Devaney finds it unnecessary to pass on the judge's finding that Elson's credibility is ''substantially mitigated by his bargaining and legal representative capacities on behalf of the Respondent.''

[4] The General Counsel excepts to the judge's failure to include in the recommended Order an express provision requiring the Respondent to give effect to the terms and provisions of the parties' memorandum of agreement reached on November 2, 1989. We find merit in this exception and shall modify the recommended Order accordingly.

WE WILL give effect to the terms and provisions of the above-described agreement retroactive to November 2, 1989.

WE WILL mail a copy of this notice to the Union and to all former employees listed in the printed cost out.

KASSER DISTILLER PRODUCTS CORP.

Monica McGhie-Lee, Esq. and *Barbara Joseph, Esq.*, for the General Counsel.

Barry R. Elson, Esq. and *Regina M. Harbaugh, Esq. (Kittredge, Donley, Elson, Fullem & Embick)*, of Philadelphia, Pennsylvania, for the Respondent.

Norton Brainard, III, Esq., of Philadelphia, Pennsylvania, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ELBERT D. GADSDEN, Administrative Law Judge. On a charge of unfair labor practice conduct filed on December 6, 1989, by Teamsters Union Local No. 115, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, AFL–CIO (the Union or Charging Party), against Kasser Distiller Products Corp. (the Respondent), a complaint was issued on February 26, 1990, by the Acting Regional Director for Region 4 on behalf of the General Counsel.

The complaint in essence alleges that the Respondent has failed and refused to bargain with the Union by failing and refusing to execute a written settlement agreement of a full and complete agreement on effects bargaining reached between the parties, with respect to benefits and other terms and conditions of employment, in violation of Section 8(a)(1) and (5) of the Act.

Respondent filed an answer on March 23, 1990, denying that it has engaged in unfair labor practice conduct as alleged.

The hearing in the above matter was held before me in Philadelphia, Pennsylvania, on June 27, 1990. Briefs have been received from counsel for the General Counsel and counsel for the Respondent, respectively, which have been carefully considered.

FINDINGS OF FACT

I. JURISDICTION

The Respondent is, and has been at all times material herein, a Pennsylvania corporation engaged in the bottling and wholesale distribution of alcoholic beverages at its facility located at Third and Luzerne Streets, Philadelphia, Pennsylvania.

During the past 12 months, in the course and conduct of its business operations, Respondent has purchased and received goods and supplies valued in excess of $50,000 directly from points outside the Commonwealth of Pennsylvania.

The complaint alleges, the answer admits, and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges, the answer admits and I find that Teamsters Union Local No. 115, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen, & Helpers of America, AFL–CIO, are and have been at all times material herein, labor organizations within the meaning of Sections 2(5) and 8(d) of the Act.

III. THE ALLEGED UNFAIR LABOR CONDUCT

A. *Background Information*

Respondent, at its Philadelphia facility, is and has been at all times material herein engaged in the business of bottling and distribution of alcoholic beverages.

At all times material herein, to at least October 24, 1989, the Respondent has recognized the Union as the exclusive representative of a unit consisting of full-time and part-time production and maintenance employees at its facility and in its employ.

The Respondent and the Union are parties to a collective-bargaining agreement effective from May 1, 1988, to April 30, 1991.

At all times material herein, Thomas Knox was chairman of the board of directors of Respondent.

B. *Bargaining Between the Parties*

Gerald Sheahan is and has been vice president of Local 115 since 1980, and has engaged in collective-bargaining with the Respondent on behalf of its employees. He identified the collective-bargaining agreement between the parties effective May 1, 1985–April 30, 1988 (G.C. Exh. 2(a)). He also identified a memorandum of an agreement extending the contract until April 30, 1991, with amendments and modifications (G.C. Exh. 2(b)).

Consistent with Sheahan's additional testimony, the record shows that a letter dated September 1, 1989, Respondent, Chairman Thomas Knox, advised Union President John Morris as follows:

> Kasser Distiller Products Corp., plans to permanently close its manufacturing operations at 3rd and Luzerne Streets, Philadelphia, PA. 19140, beginning on or about October 31, 1989. As a result of this action, Kasser anticipates that it will be required to terminate a number of employees at that site. These terminations will become effective between October 1, 1989 and December 31, 1989. A list of the job titles of the position to be affected as a result of this action, and the names of the workers currently holding affected jobs, is attached hereto:
>
> *Wine Storage*
> Earl Spearman
>
> *Maintenance Plant*
> William Burnes
> Nicholas Pulaski
>
> *Rectifying*
> Joe McElroy
> Tom Tomlin
> Jorge Polo
>
> *Bottling*

Melvin Scott
James Bryant
Fred Brooks
Bill Burns, III
Robert Choice
John Cornish
Ed Harsch
Luis Nartinez
Norman Mansfield
Angelina Pomponio
Jasper Robinson
Mike Robinson
Orlando Santiago
Jose Santa
Florence Sessions
Elbert Stokes
Greg Tait
Larry Washington
Ed Wilcox
Rose Trost
Wendell Williams
Tom Garofalo

Shipping
Fred Brook, Jr.
George Trost

Union Vice President Sheahan acknowledged receipt of the above-identified letter and testified that in response thereto, the Union requested to meet with Respondent to discuss the effects of the closing and severance. A meeting was held September 28, 1989, at the Union's office. Present for the Union were Business Agent Robert Henninger, steward Joseph McElroy, and Gerald Sheahan. For the Company, Thomas Knox. During the meeting the Union expressed its belief that the Company was still a viable business but the Respondent told them it was not and that it was closing down. Under such circumstances, the Union proposed a severance package requesting 5 days' pay for each employee for every year of service with Respondent; the benefit concerning health and welfare coverage, legal services coverage, and scholarship fund coverage extended for a period of 6 months after the shutdown of the facility.

The Union also wanted information concerning the status of each employee who is a member of Respondent's pension plan. It wanted employees to receive unused sick time, holiday pay, vacation pay for which they were eligible; and language in an agreement which covered the eventuality of Respondent reopening the business, that the employees would be rehired and seniority of the Union recognized. Since Respondent could cost out such an agreement at this time. The parties agreed to meet again.

The parties met again October 17, 1989, at the Union's office. Present for the Union was Sheahan and McElroy. For Respondent, Knox, Art Mullin, financial executive, and Elson, counsel for the Respondent herein. At the meeting the Union again questioned the Company's motive for closing the facility but the Company counterproposed to give each employee 1 day's pay for each year of service, up to a maximum of 25 days of severance pay. It did not want to continue the benefits program for 6 months as the Union requested, but in lieu thereof, Respondent would give each employee a flat payment of $1,000 which the Union rejected. Respondent agreed with the Union's request to pay the employees for unused vacation time, sick time, and holiday pay, and to language providing for recall of unit employees and recognition of the Union if Respondent reopened the business operation. Respondent (Elson) said he did not think that was a problem. Respondent also agreed to send the Union its pension plan and the status of each employee participating in it.

The Union requested that all the employees who had worked for the Respondent receive the benefit of the severance pay and other benefits negotiated at this time. However, the Company was opposed to employees who had left the Company prior to the layoff and the shutdown receiving such pay and benefits. The Union argued that those employees knew the Company was going out of business and they left to get jobs at the time when that opportunity presented itself. The Union felt they should not be excluded from the formula that the settlement agreement would cover because the employees in question had anywhere between 10 and 25 years seniority.

Knox testified that at the meeting (October 17) Mullin told him he (Knox) ''could not commit the company to anything at that time or in the future, without approval of Respondent's board of directors, of which Knox was chairman.'' Knox testified he told Mullin if the Board did not approve his offers, he (Knox) would pay for them out of his own pocket. In any event, the record does not show that Knox did not have authority to negotiate for Respondent without further approval by Respondent. Nor does the record show that Knox ever communicated any such limited bargaining authority to the Union.

On October 25, 1989, the Union received a fax from the Respondent concerning the pension plan, and also another fax on the same date outlining a wage offer for a settlement that was offered during the previous meeting.

Further testifying, Sheahan identified the first fax to the Union dated October 25, 1989 (G.C. Exh. 5) at 8:56 a.m. or p.m., producing the chart offer Respondent made to the Union during the October 17 meeting, listing the names and dates of hire of each of the employees in the unit with 10 to 25 years tenure with Respondent, along with their rates of pay, pension and monthly benefits, but not showing severance pay for those persons who left the Company when they learned Respondent had planned to close down.

Since the telecopy printed out did not include those employee's who recently left the Respondent's employ after Respondent announced it was closing the facility, the Union argued that the five employees had combined 100 years of seniority with Respondent; that they should not be penalized simply because they left Respondent's employ 2 to 4 weeks prior to the closing in order to take advantage of available work; that the Union was not insisting on other employees who left the employ of the Respondent months or years earlier.

Nevertheless the Union took the pension plan documentation (G.C. Exh. 5) and discussed it with its actuarian. Thereafter, 2 days later, the Union (Sheahan) called Tom Knox and informed him that the severance offer of 1 day's pay for each year of service up to a maximum of 25 days was not acceptable; and that the $1000 flat fee was something the Union did not want to entertain in lieu of benefits, health and

welfare pension, scholarship and legal services for a period of 6 months.

Sheahan counteroffered that severance pay be based on 2 days' pay for each year of service up to 10 weeks' pay, and repeated the Union's demand to include the five contested employees in the total severance package; and that the benefits covered be paid for 6 months following closing of the facility. Knox reiterated that the five contested employees would be included but agreed to get back with Sheahan.

On November 1, 1989, Respondent transmitted a fax on its telecopier machine to the Union which was a printed costout like the one sent to the Union October 25, 1989, except that it had proposed severance pay based on 2 days' pay for each year of service only up to 8 weeks' pay, instead of 10 weeks' pay, with no payment for continuation of benefits coverage. It contained the added handwritten language at the bottom of the page: ''1) All employees 2) without flat fee,'' (G.C. Exh. 6, 63–64). Knox testified that the latter costout included the cost of severance pay to the five contested senior employees.

The Union's contention that Respondent's November 1, 1989 fax was an offer because it embraced Respondent's October 17 offer which was transmitted to the Union October 25, 1989, and that this time, the November 1 letter included the five contested senior employees without payment for continuation of benefits coverage. Under these circumstances, I find that the Union's interpretation and conclusion that the Respondent's November 1 letter was an offer was a reasonable conclusion.

Consequently, Sheahan (the Union) testified he telephoned Knox the next day (November 2, 1989). He testified without dispute that he called Knox and told him he had taken a ''major step'' by offering to include the five senior employees previously excluded by Respondent, because the Union probably could not settled this matter without including them. Knox said ''we raised the pay, we included the guys but we eliminated the $1000. When Sheahan asked Knox whether he was going to continue the benefits covered, Knox said, ''We're going to eliminate the $1000 but we can't do anything else in this area.'' Sheahan agreed, if Respondent would increase the maximum severance pay to 10 weeks with termination of the pension plan. The agreement would not preclude employees from receiving unemployment compensation, to which Knox replied, ''I'll do it.'' When Sheahan asked, ''Do we have an agreement?'' Knox replied, ''Yes, we do.'' Thereafter, they discussed drafting a memorandum of the agreement and Sheahan agreed to draft it and requested Knox to send him a computer printed costout reflecting their agreement and he would send the memorandum to Knox.

Although Knox acknowledged at the hearing that on November 1, 2, or 3, 1989, he discussed severance benefits with Sheahan, he testified he did not agree or have authority to agree, to pay severance benefits to all unit employees, including the five contested employees. It is particularly noted however, that Knox did not testify that he told Sheahan during their conversations on November 1, 2, or 3, 1989, or at any previous time, that he did not agree, or did not have authority to agree to the terms which they discussed. Since Knox did not so testify, I find that Sheahan's testimonial account is not disputed by Knox, and I do not credit his latent denial that he did not agree to the terms described by Sheahan during their telephone conversations. Moreover, Knox's testimony in this regard is in conflict with his telecopy letter transmitted to the Union on November 1, and his first transmittal to the Union on November 3, 1989, infra.

On November 2, 1989, Sheahan completed the memorandum of agreement, except for the printed costout which Knox was to prepare and transmit to him and he would transmit the memorandum to Knox.

On the next day, November 3, 1989, the Union received two computer printed costout sheets via the telecopier machine. One sheet (G.C. Exh. 7(a)) precisely reflected the terms of the telephone discussion between Knox and Sheahan on November 2, 1989; namely, severance pay for all unit employees including the 5 contested employees Certaine, Campbell, Keitt, Brooks, and Brooks, Jr., based on 2 days' pay for each year of service up to 10 weeks' pay, payment for unused vacation pay, and pension payouts.

The second payout sheet transmitted by Respondent a few minutes later on November 3, 1989, reflected the same terms discussed during the November 2 telephone conversation, except the inclusion of the five contested senior employees (G.C. Exh. 7(b)). Handwritten on the face of this printed costout was the word ''preferred.'' Since Sheahan recognized the first printed costout (G.C. Exh. 7(a)) as the one Knox agreed on during their November 2 telephone conversation, he attached it (G.C. Exh. 7(a)) to the Union's executed memorandum of agreement, and transmitted it by telecopier to Respondent (Knox) for his signature on November 3, 1989. Respondent (Knox) acknowledged it received the memorandum agreement with the costout attached (G.C. Exh. 7(a)) at 4:15 p.m. on November 3, 1989, but Respondent did not contact the Union after it received the memorandum.

Since Respondent acknowledged receipt of the memorandum agreement but did not thereafter contact the Union, Sheahan (the Union) telephoned Knox on Monday, November 6, 1989, to inquire of its November 3 transmittal to Respondent. Knox confirmed that he received the November 3 transmittal from the Union with the attached costout. Sheahan asked Knox:

> Sheahan: Is that our agreement?
>
> Knox: Yes, it is.
>
> Sheahan: Okay are you going to sign it and send it back to us?
>
> Knox: No, I'm going to send it to may attorney first . . . that's our agreement but I'm going to bounce it off my attorney.
>
> Sheahan: Okay, then we will wait to hear from you.

During their telephone conversation, Knox did not express any objection or problem with the Union's drafted agreement and the attached costout (G.C. Exh. 7(a)) except that he had to make sure that sick and holiday pay were not issues. Nevertheless, the Union (Sheahan) unsuccessfully made several calls and left several messages for Knox during the period November 7–21, 1989, to inquire about the agreement. Finally, on November 22, 1989, the Union received two telecopier transmissions from Knox. The first, at 2:01 p.m. (G.C. Exh. 9(a)) was a four-page document including a cover page, which had a portion of the next page copied on the lower half thereof. The pages of this document were numerically out of order and confusing. Even Knox acknowledged

in his testimony that this transmission was a poor facsimile of what he was trying to send to the Union.

The second transmission on November 22, at 2:17 p.m., was a three-page document including the cover sheet which indicated there were four pages (G.C. Exh. 9(b)). Nevertheless, the second page was label ''agreement between Kasser Distiller Products Corp., and Teamsters Union Local No. 115.'' The third page was the second page with signature lines at the bottom. There was no four page. Sheahan disregarded the first transmission (G.C. Exh. 9(a)) as a ''misfired fax'' and read the second transmission (G.C. Exh. 9(b)) which he recognized was the Union's draft of the memorandum agreement with minor changes which were agreeable to the Union. However, this second document described the severance pay formula as agreed upon November 2 during the telephone conversation, although there was no list as to which employees would receive what. It did not contain a costout as had been attached to the drafted memorandum of agreement the Union sent to Respondent November 3. Sheahan called Knox that afternoon (November 22, 1989) to inquire why the attached costout, as they had agreed, was not returned. Their conversation was as follows:

> Sheahan: We don't have that third sheet. You know, we need that to complete.
>
> Knox: Well we don't have any agreement on paying everybody . . . we're not going to pay the 5 guys.
>
> Sheahan: What do you mean, we don't have an agreement? You already agreed to it before and you said it was okay and we agreed to it. . . . What the hell are you talking about? That's how we got the agreement in the first place. You agreed to pay everybody, include them in there and they would get 10 weeks' pay and that's what we agreed to 3 weeks ago, and we sent that to you and you said that was okay. Now you're saying its not okay?
>
> Knox: We don't have any agreement on that.

Sheahan testified without dispute that Knox did not state why there was no agreement on the severance pay issue. Thereafter, there was no communication between the parties until November 27, 1989. On that date, Sheahan telephoned Respondent to speak with Knox. Since Knox was not available, he spoke with Arthur Mullin, an executive of Respondent. Mullin informed Sheahan that there was no agreement between the parties and Sheahan insisted that there was an agreement, and he agreed to transmit telecopies of what had been transmitted to Knox November 3.

At a later hour on November 27, 1989, Mullin transmitted a nine-page document (G.C. Exh. 11) to the Union in which he (Mullin) denied that there was ever a severance agreement between the parties including the five contested employees. However, his letter continued with the following offers to the Union:

> 1. Respondent's identical offer made to the Union November 1, of two days pay for each year of service up to 8 weeks.
>
> 2. Respondent's identical offer made and agreed upon by the parties November 2, except the five contested individuals would receive only 50 percent of the 10 weeks formula.
>
> 3. The Union could accept the bottom line of $70,000 lump sum to distribute any way it desired.

Offers 2 and 3 had not been previously presented to the Union.

Issues

1. The ultimate issue is whether the Respondent failed and refused to excused a written contract embodying the terms of an oral agreement with the Union, in violation of Section 8(a)(1) and (5) and 8(d) of the Act.

2. The subordinate factual issue presented for determination is whether the parties ever reached a severance pay agreement.

The General Counsel argues that the parties reached a severance pay agreement during their telephone discussion on November 2, 1989.

The Respondent argues that the parties did not reach a settlement agreement because there was never a meeting of the minds of the parties on November 2, 1989, or any other time; and that the November 3, 1989 cost projections labeled ''preferred'' (G.C. Exh. 7(b)) differed from the formula in the previous cost projection (G.C. Exh. 7(a)) transmitted by Respondent to the Union only a few minutes earlier on November 2, 1989.

Analysis and Conclusions

In determining whether the collective-bargaining parties reached an agreement under the Act, the Board and the courts have established several guidelines in making such a determination.

As counsel for both parties argue, while the technical rules of contract law are not necessarily controlling in labor relations negotiations, *Lozano Enterprises v. NLRB*, 327 F.2d 814, 817 (9th Cir. 1964), the normal rules of offer and acceptance in contract law are applicable to determine whether an agreement was reached between the parties. *F. W. Means & Co. v. NLRB*, 377 F.2d 683, 686 (7th Cir. 1967). However, unlike the rules governing the creation of a commercial contract, in collective bargaining, an offer is not automatically terminated by the rejection or counteroffer of the other party. *Lozano Enterprises v. NLRB*, supra.

Additionally, an offer can be accepted and the parties bound without the agreement, being reduced to writing and signed. *Capitol-Husting Co. v. NLRB*, 671 F.2d 237, 243 (7th Cir. 1982).

In order to find acceptance of an offer, all that is needed is conduct manifesting intention to agree, to abide and be bound by the terms of an agreement, *Capitol-Husting Co. v. NLRB*, supra; and that a party's word and conduct are judged by a reasonable standard with no consideration of real or unexpressed intentions. *Pittsburgh-Des Moines Steel Co.*, 202 NLRB 880, 888 (1973), citing 17 CJS, Contracts, sec. 32, p. 361.

In the instant case, the parties were engaged in collective bargaining on the effects of Respondent's announced closing since September 28, 1989. However, the dispute arises as to whether the parties reached an agreement upon the essentially undisputed communications between them as follows:

> 1. Respondent's (Knox) November 1, 1989 letter offering severance pay based on two days pay for each

year of service up to 8 weeks pay for all employees, including the 5 contested employees who left the Respondent's employ after they learned or heard about Respondent's closing.

2. Sheahan's telephone call to Knox to November 2, 1989, in which Sheahan told Knox he had taken a ''major step'' by including the 5 contested employees because the Union could not settle without their inclusion. Knox undisputedly stated, ''we raised the pay,'' ''we included the guys,'' eliminated the $1000 and we can not continue the benefits coverage. Sheahan undeniedly agreed if Respondent would increase the maximum severance pay to 10 weeks with termination of the pension pay and not preclude the employees from receiving unemployment compensation. Knox undisputedly responded, ''I'll do it.'' Sheahan asked Knox, ''do we have an agreement?'' Knox undisputedly replied, ''yes, we do.''

At the conclusion of the above-described November 2, 1989 telephone conversation, Sheahan and Knox discussed drafting a memorandum of agreement, and Sheahan volunteered to draft it and he requested Knox to send him a computer printed costout reflecting their agreement. Apparently elated that he had a settlement agreement, Sheahan completed the memorandum of agreement and sent it to Knox that afternoon (November 2, 1989).

On the next day (November 3, 1989), Sheahan received two computer printed costout via telecopier. The first costout (G.C. Exh. 7(a)) embraced the terms of the telephone conversation the parties had the day before, providing severance pay for all unit employees, including the five contested employees, Certaine, Campbell, Keitt, Brooks, and Brooks Jr., based on 2 days' pay for each year of service up to 10 weeks' pay for unused vacation pay and pension payouts.

Sheahan (the Union) received a second printed costout from Knox by way of the telecopier (G.C. Exh. 7(b)) a few minutes later, which reflected the same terms of the November 2, 1989 telephone conversation, except for the inclusion of the five contested employees and bearing a handwritten label ''Preferred'' on its face. Since Sheahan recognized the first printed costout (G.C. Exh. 7(a)) as the one to which he and Knox had agreed on November 2, he attached a copy of it to the Union's executed memorandum of agreement and sent it by telecopier November 3, 1989, to Knox for his signature.[1]

Based upon the credited testimony of Sheahan and the written communications between the parties, I conclude and find that Respondent (Knox) amended his written offer of November 1, 1989, during the November 2, 1989 telephone conversation with Sheahan, to increase the severance pay based on 2 days' pay for each year of service from 8 weeks' pay for all employees, to 10 weeks' pay. Since Respondent's November 1, 1989 letter had already assented to including the five contested employees who left Respondent's employ after they learned or heard about Respondent's closing, such proposal by Respondent constituted an offer. Consequently, when Sheahan told Knox Respondent had taken a ''major step'' by including the five contested employees, and Knox repeated the terms of the agreement, including the same pay for the five contested employees, and further agreed not to preclude the employees from receiving unemployment compensation, the parties had reached an agreement, and Knox unequivocally stated that they had an agreement.

Under the above-described circumstances, it is clear that the Respondent had accepted the proposal to raise the 2 days' pay for each year of service to 10 weeks and the Union had accepted the Respondent's offer to include the five contested employees. It is also clear that the parties agreed that Sheahan would reduce the terms of the parties' agreement to writing. Respondent did not immediately object to the memorandum of agreement upon its receipt of it. Moreover, on November 3, 1989, Respondent mailed the copy of its costout (G.C. Exh. 7(a)) for all of the employees, including the five contested employees, to the Union, as Sheahan had telephonically requested during their November 2 conversation. Consequently, when Sheahan attached the costout (G.C. Exh. 7(a)) to a copy of the memorandum of agreement and transmitted it to the Respondent for Knox' signature on November 3, 1989, the severance pay agreement had been effectively reduced to writing. In fact Sheahan's receipt of the first computer printed costout (G.C. Exh. 7(a)) on November 3, 1989, constituted documentary confirmation of the parties' November 2, 1989 oral agreement, which Sheahan had reduced to writing and transmitted to Knox on both November 2, and again, with Respondent's costout (G.C. Exh. 7(a)) on November 3, 1989.

Respondent further argues that its second printed cost projection of November 3, 1989 (G.C. Exh. 7(b)), labeled ''Preferred,'' was evidence that the parties had not reached an agreement but continued to negotiate. However, I find that Respondent's latter argument is not supported by the evidence. On the contrary, the Union's receipt of this preferred document (G.C. Exh. 7(b)) was after the fact of the parties' telephone agreement of November 2, 1989, as well as after the fact that the Union had received Respondent's printed costout (G.C. Exh. 7(a)) that the Union had requested Respondent to transmit to the Union. Respondent complied with that request, and later, indicated on its second transmitted costout (G.C. Exh. 7(b)), that it ''Preferred'' the latter costout. However, by transmitting the memorandum of agreement to the Respondent for signature on November 2, and again on November 3, the Union had further confirmed its acceptance of Respondent's offer to include the five contested employees. Likewise, by ignoring the printed cost projection (G.C. Exh. 7(b)), labeled ''preferred,'' the Union rejected what Respondent preferred and held Respondent to its telephone offer and its written confirmation of the printed costout (G.C. Exh. 7(a)), transmitted to the Union before the second ''preferred'' printed costout (G.C. Exh. 7(b)).

It is therefore clear, by both the oral conversations of the parties and Respondent's conduct of transmitting the printed

[1] I credit Sheahan's essentially undisputed testimonial account over Knox's latent denial that the parties reached an agreement during their telephone conversation on November 2, 1989, because I was persuaded by their demeanor that Sheahan's fluent, self-assured and positive manner of testifying was truthful and accurate. To the contrary, Knox's account of their conversation was extremely limited and uncertain in several respects. Moreover, I further find that the timing and substance of Respondent's first telecopy letter to the Union on November 3, 1989 supports the testimonial account of Sheahan. The November costout (G.C. Exh. 7(a)) was as much an offer as was Respondent's previous costout, which the Union had rejected.

costout projection (G.C. Exh. 7(a)) in concurrence with the parties conversation of November 2, 1989, that the parties reached agreement on November 2, which was further confirmed on November 3, 1989. *Pittsburgh-Des Moines Steel Co.*, supra; *Capitol-Husting Co. v. NLRB*, supra. See also *Ogle Protection Service*, 149 NLRB 545 (1964).

Finally, Respondent contends that Knox did not have authority to reach an agreement with the Union without approval of the board of directors of Respondent, of which he was the chairman. The record however, is barren of any evidence that Knox did not have authority to execute a final agreement, or that he ever communicated such lack of authority to the Union. In fact, Knox undeniably testified that during the October 17, 1989 bargaining meeting with the Union, in response to Mullin telling him he did not have the authority to make an offer—commit the company without the approval of the board of directors, he (Knox) told Mullin, ''well if they won't approve it, I'll pay it out of my own pocket.'' hereafter, Knox continued to make offers to the Union on behalf of Respondent for severance pay. At no time was the Union notified that Knox was negotiating on behalf of Respondent without authority to do so.

It is particularly noted that Respondent does not contend that Knox did not have the authority to negotiate. It only latently implies that Knox was required to have prior approval to reach a binding agreement with the Union. However, the Board has long held that an agent appointed to negotiate a collective-bargaining agreement, as Knox obviously was, is deemed to have apparent authority to bind his principal in the absence of clear notice to the contrary. *University of Bridgeport*, 229 NLRB 1074 (1977). Here, the Union was not given any notice that Knox did not have authority to bind Respondent and I find that Knox had such authority. *University of Bridgeport*, supra. *NLRB v. Donkin's Inn, Inc.*, 532 F.2d 138 (9th Cir. 1976); *Ben Franklin National Bank*, 278 NLRB 986, 995 fn. 8 (1986).

Notwithstanding, when Sheahan did not hear from Knox after he transmitted the memorandum of agreement with the printed costout (G.C. Exh. 7(a)) to Knox, he called Knox on November 6, 1989. At that time, Knox acknowledged receipt of Sheahan's transmittals of November 2 and 3, 1989, and that the parties had an agreement. He expressed no objections to the memorandum of agreement with the attachment, and only reiterated what the parties had agreed would not be included in the agreement: namely, sick leave and holiday pay. Knox only stated that he wanted his attorney to review the document. Thereafter, no word was heard from the Respondent until November 22, 1989, at which time Respondent returned an edited version of the memorandum of agreement to the Union, with the most material change being deletion of the five contested employees from the printed costout. Other minor editorial changes were made by the Respondent referable to the provision that Respondent would offer employment to all employees should Respondent reopen its business were as follows: ''operation'' to ''current operations,'' ''offer employment'' to ''employ,'' and the addition: ''to the extent positions are available and former employees are competent to perform duties of those positions.''

In this regard, the Union and the General Counsel argue, and I agree, that these minor changes are not of the ''quality as to infer a lack of agreement or an intent to modify what was agreed upon.'' This is especially true since the Union (Sheahan) had no disagreement with the minor changes. *Cowles Publishing Co*., 280 NLRB 903, 911 (1986).

Additionally set forth in *Shawn's Launch Service*, 261 NLRB 836, 837 (1982), and cited in *Cowles Publishing Co.*, supra:

> With regard to the discrepancies in the first draft of the contract, there can be no question that they were merely inadvertent errors in transcription by the Union and in no wise indicated that the minds of the parties had not met. While it is, of course, true that, as Respondent argues, an employer is not obligated to execute a contract which does not mirror the agreements reached, that the problem was obviated once the Union willingly made the correction sought and prepared a fresh copy. *Reppel Steel & Supply Co., Inc*., 239 NLRB 358, 362 (1978).

Consequently, I find that these and other minor changes made by Respondent herein, do not indicate a failure to agree (that the minds did not meet). In fact, the Union does not object to any of these and other minor editorial changes by Respondent. The waiver language is performer language and is appropriate and not uncommon in such settlements. At most, such editing by the Respondent is in accordance with an employer's obligation to comment upon a draft and assist in reducing an agreement to writing. *Georgia Kraft Co.*, 258 NLRB 908, 912 (1981).

I therefore conclude and find upon the foregoing credited evidence, reasons and cited legal authority, that the Union and the Respondent reached a settlement agreement on November 2, 1989, which was further confirmed on November 3, 1989; that Respondent agreed that the Union would reduce the agreement to writing and Respondent would furnish the Union with a printed costout for employees, including the five disputed former employees; that the Respondent accordingly transmitted the printed costout to the Union on November 3, 1989; and that the Union accordingly transmitted the memorandum of agreement to Respondent for signature on November 2, and again on November 3, 1989.

I further find that since November 3, 1989, Respondent has failed and refused to sign and return the memorandum of agreement as agreed to by the parties on November 2 and 3, 1989, *H. J. Heinz Co. v. NLRB*, 311 U.S. 514, 526 (6th Cir. 1941), and that such failure and refusal constituted a failure and refusal to bargain in good faith, in violation of Sections 8(a)(1) and (5) and 8(d) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES ON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with the operations of the Respondent described in section I, above, has a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in unfair labor practice conduct within the meaning of Sections 8(a)(1) and (5) and 8(d) of the Act, I shall recommend that it cease and

desist therefrom and that it take certain affirmative action designed to effectuate the policies of the Act.

Because of the character of the unfair labor practice conduct herein found, the recommended Order will provide that Respondent cease and desist from or any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed by Section 7 of the Act. *NLRB v. Entwistle Mfg. Co.*, 120 F.2d 532, 536 (4th Cir. 1941).

On the basis of the above findings of fact and on the entire record in this case, I make the following

CONCLUSIONS OF LAW

1. The Employer, Kasser Distiller Products Corp., is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Teamsters Union Local 115, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, AFL–CIO, are, and have been at all times material herein, labor organizations within the meaning of Sections 2(5) and 8(d) of the Act.

3. By failing and refusing to sign and execute the memorandum of agreement to which the parties previously agreed November 2 and 3, 1989 and transmitted to Respondent by the Union, the Respondent has, and is failing and refusing to bargain in good faith with the Union, the lawfully designated collective-bargaining representative of its former employees, in violation of violation of Sections 8(a)(1) and (5) and 8(d) of the Act.

On these findings of fact and conclusions of law and on the entire record, and I issue the following recommended[2]

ORDER

The Respondent, Kasser Distiller Products Corp., Philadelphia, Pennsylvania, its officers, agents, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain with the Union in good faith by failing and refusing to sign and execute the memorandum of agreement transmitted from the Union, which embodies the oral agreement to which the parties agreed November 2, 1989.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and, on request, sign and execute the memorandum of agreement embodying the oral agreement to which the parties agreed November 2, 1989, which was transmitted to us by the Union.

(b) Post at Respondent's Third and Luzerne Streets, Philadelphia, Pennsylvania facility copies of the attached notice marked ''Appendix.''[3] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by Respondent's authorized representative, shall be mailed to the Union and to each former employee named in the printed costout (G.C. Exh. 7(a)) at their home addresses.

(c) Notify the Regional Director in writing within 20 day from the date of this Order what steps the Respondent has taken to comply.

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to the shall be deemed waived for all purposes.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

Monica McGhie-Lee, Esq. and *Barbara Joseph, Esq.*, for the General Counsel.

Barry R. Elson, Esq. and *Regina M. Harbaugh, Esq. (Kittredge, Donley, Elson, Fullem & Embick)*, of Philadelphia, Pennsylvania, for the Respondent.

Norton Brainard, III, Esq., of Philadelphia, Pennsylvania, for the Charging Party.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

ELBERT D. GADSDEN, Administrative Law Judge. A hearing in the above-captioned case was held before me in Philadelphia, Pennsylvania, on June 27, 1990. I issued a decision in the matter on November 15, 1990. The Respondent filed exceptions and a supporting brief and the General Counsel filed an exception and answering brief.

The Board having considered the decision and record in light of the exceptions and briefs filed, remanded the decision to me to discuss the testimony of Respondent's witnesses, Thomas Knox, Arthur Mullin, and Barry Elson, with respect to statements made by them in the presence of Union Representative Gerald Sheehan concerning the bargaining authority of Thomas Knox.

In my decision, I found that the bargaining parties, Thomas Knox (Respondent) and Gerald Sheehan (the Union), reached a severance pay agreement on November 2, 1989. Respondent contended the parties did not reach an agreement because Thomas Knox did not have authority to reach a binding agreement without approval of the board of directors of Respondent; and that such fact of his authority had been communicated to the Union (Sheehan) during an October 1989 bargaining session.

In this regard the evidence established that the parties first met in bargaining session at the Union's office on September 28, 1989. Present for the Union were Business Agent Robert Henneger, steward Joseph McElroy, and Union Representative Gerald Sheehan. Present for Respondent was Thomas Knox. Prior to the meeting, the Union had been notified by the Respondent that it was closing down, and during the meeting Knox reiterated that announcement by informing Sheehan that Respondent was closing the subject business. Thereupon, the Union proposed its first severance package as described in my original decision. However, since Respondent could not cost out the proposal, the parties agreed to meet again. Nothing was mentioned during this meeting about Knox's authority to bargain for the Respondent.

The bargaining parties met again on October 17, at which time Respondent presented a severance pay counterproposal (not germane here, but described in my decision). Knox testi-

fied that during this meeting, Arthur Mullin of the Respondent told him (Knox) that he (Knox) ''could not commit the company to anything at that time or in the future without approval of Respondent's Board of Directors,'' of which Knox was chairman; and that he (Knox) told Mullin ''if the Board did not approve his offers, he (Knox) would pay for them out of his own pocket.''

Testifying in this regard, Arthur Mullin stated he did not tell Knox, in the presence of other persons, that Knox did not have binding bargaining authority, and that any offer that he (Knox) made was subject to approval by Respondent's board of directors. It is particularly noted, however, that although Knox testified that Mullin gave him the stated admonition about his bargaining authority, and Mullin acknowledged he gave Knox the admonition, neither Knox nor Mullin testified or verified that Sheehan, McElroy, or any other union representative was present and overheard Mullin's admonition to Knox.

Only counsel for Respondent, Barry Elson, testified that he believed Knox stated *in the presence of other persons in the October meeting*, that any offers made by him (Knox) were subject to approval by Respondent's board of directors. Such a belief is not a statement of fact. Even Knox did not testify the admonition was given in the presence of other union persons.

Elson further testified that Mullin had in fact admonished Knox in the presence of union representatives in the October 17 meeting about Knox's lack of authority to reach a binding agreement with the Union without prior approval of the board of directors. Again, even if Mullin had given such admonition to Knox Respondent has not shown that such admonition was directly communicated to the union representatives present, or that such representatives (Sheehan) overheard or responded to such admonition.

Respondent appears to contend that through its witnesses (Knox, Mullin, and Elson), Respondent had in fact apprised the Union that Knox did not have bargaining authority to reach a binding agreement with the Union without prior approval of its board of directors. I am not persuaded by Respondent's contention.

Although Respondent was represented by Thomas Knox in the first bargaining session on September 28, 1989, neither Knox nor any other representative of Respondent informed the Union that Knox did not have authority to reach a binding agreement without prior approval of Respondent's board of directors, of which Knox is chairman. Under these circumstances, I find it was normal and not unreasonable for the Union to assume and rely on the apparent authority of Knox to reach a binding agreement with the Union.

With respect to the October 17 meeting and the statements Mullin and Knox testified Mullin made to Knox about his authority to reach a binding agreement, I find that the evidence fails to establish that any limitations placed on Knox's bargaining authority was ever communicated directly to Sheehan or the Union by Respondent. At most, Respondent presented testimony that Mullin gave Knox such an admonition about his lack of binding bargaining authority during the October 17 meeting. For certain, the record is barren of any evidence that Mullin had directed any statements about Knox's lack of binding authority to Sheehan or other union representatives, or that Sheehan or any union representatives overheard or inquired about such authority of Knox. Consequently, I do not find that Knox or Mullin ever communicated any limitations on Knox's bargaining authority to the Union. To the extent that their testimony may be construed that they did so communicate, I discredit their accounts because I was not persuaded by their demeanor that they truthfully testified that they did communicate limitations on Knox's bargaining authority to the Union.

Although Respondent's counsel, Barry Elson, testified he believed Knox stated in the presence of Sheehan or other Union representatives during the October meeting that Knox had such a limitation on his bargaining authority, Elson could not categorically state as a fact that Knox made such a statement during the meeting. Elson simply stated he believed that Knox made such a statement in the presence of other persons. Although Elson later testified, that Mullin ultimately made such a statement during the meeting on October 17, no evidence was offered to show that the statement was directed to Sheehan or that Sheehan (the Union) heard or responded to any such statement by Mullin.

Elson is an attorney at law and, presumably, is aware of the importance to explicitly communicate to the Union, any limitations on the bargaining authority of the Respondent's bargaining representative (Knox), the evidence fails to show that such a communication was directed to and transmitted to the Union during the October bargaining meeting, or at any other time prior or subsequent thereto.

Elson is also counsel for Respondent in this proceeding and as such, he has an interest in its final disposition. Under these circumstances, his credibility is substantially mitigated by his bargaining and legal representative capacities on behalf of the Respondent. Moreover, I was not persuaded by his demeanor that he was testifying truthfully in this regard. For the above reasons, and the uncertain testimony of Elson's ''belief'' what Knox may have said in the October bargaining meeting, I do not credit Elson's testimony that the Union was informed that Knox did not have bargaining authority to reach an agreement with the Union, without approval of the board of directors.

Additionally, I am further persuaded by the evidence of record that the Union was not informed of any limitations on Knox's bargaining authority during the bargaining discussions (offers and counteroffers) between Knox and Sheehan prior and subsequent to October 17. The record does not show that Knox ever told Sheehan he had to obtain approval of any offers or acceptances made by himself on behalf of Respondent. This was true even on November 2, when Sheehan asked Knox, ''Do we have an agreement?'' Knox replied ''Yes, we do.'' Knox did not say ''Yes, if the Board of Directors approve it.'' When Sheehan did not receive a reply to his written recitation of their oral agreement with the transmittal attached to it, and called Knox on November 6 and asked Knox was the transmittal a completion of their agreement, Knox said ''Yes, it is.'' When Sheehan asked Knox was he going to sign it, Knox said ''No, I'm going to send it to my attorney first,'' acknowledging that the November 3 transmittal was their agreement but stating, ''I'm going to bounce it off my attorney.'' Knox did not tell Sheehan he had to have any of the series of offers and counteroffers by Respondent or the Union approved by Respondent's board of directors. Under these circumstances, Sheehan simply said, ''Okay, then we will wait to hear from you.''

The Union made several calls and left several messages for Knox between November 7 and 21, 1989, to inquire about Respondent's signing the agreement. Finally on November 22, Knox sent documents to Sheehan the terms of which were inconsistent (partially changed) with the terms of their telephone conversations and telecopy transmittals of November 1 and 2. Specifically, during the telephone conversation on November 22, Knox told Sheehan ''Well we don't have any agreement on paying everybody we're not going to pay the five guys.'' At no time did Knox tell Sheehan their telephone agreement was not approved by the board of directors, but merely denied there was any agreement. When Sheehan thereafter called Mr. Mullin on November 27, Mullin told Sheehan there was no agreement. He did not tell Sheehan the agreement or the proported agreement was not approved by Respondent's board of directors, but simply stated that there was no meeting of the minds of the parties. However, I find otherwise, as explained in my previously issued decision.

The record shows that Respondent raised for the first time in this proceeding, the defense that Knox did not have authority to reach an agreement with the Union without prior approval of Respondent's board of directors. However, I discredit the testimonial accounts of Knox, Mullin, and Elson in this regard for the reasons discussed above. Moreover, other nontestimonial evidence of record discussed above does not support their testimony, nor the Respondent's defense, that Knox did not have authority to reach an agreement with the Union, without the approval of Respondent's board of directors.

Assuming arguendo, that Knox did not in fact have unlimited bargaining authority to reach an agreement with the Union without approval of the board of directors, the record does not show that Knox's statement of his personal assumption of a severance package was ever directed to or overheard by the union representatives. Consequently, the Union could not have been relying upon Knox's exclamation which it did not hear or know about. If it had, Knox in all probability would be personally bound to pay out of his own pocket, the severance pay package agreed to on November 1 and 2, 1989. Under the circumstances here, Knox is not individually and personally responsible for the severance package because Knox's personal exclamation was not shown to have been communicated to the Union.

Based on the foregoing findings, reasons and conclusions, I am persuaded that no change is warranted in the findings and conclusions of law, as they may relate to the bargaining authority of Knox, set forth herein and in my decision of November 15, 1990.